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No. 82-494

In the Supreme Court of the United States

OCTOBER TERM, 1982

BATH IRON WORKS CORPORATION, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the decision in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962), which clarified the jurisdictional scope of the Longshoremen's and Harbor Workers' Compensation Act of 1927, should be applied retroactively.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 681 F.2d 81. The decision of the Benefits Review Board (Pet. App. 21a-62a) is reported at 13 Ben. Rev. Bd. Serv. (MB) 970. The decision and order of the administrative law judge (Pet. App. 63a-65a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20a) was entered on June 23, 1982. The petition for a writ of certiorari was filed on September 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent Donald J. Simpson, an employee of petitioner Bath Iron Works Corporation, was injured on November 21, 1941, while working as a welder on board a vessel under construction on a marine railway at the Bath Iron Works shipyard (Pet. App. 2a). He fell approximately 50 feet from the deck of the vessel, landing on his back on a set of pipes. The accident left him a paraplegic, confined to a wheelchair, and totally disabled (*id.* at 2a, 23a, 63a). Simpson sought and received benefits under the Maine Workmen's Compensation Act at the maximum rate of $18 per week from November 1941 to April 1948, when his accumulated compensation reached the state's $6,000 ceiling (*id.* at 2a, 23a). He then petitioned the State Industrial Commission for further reimbursement of his continuing medical expenses and supplies. The Supreme Judicial Court of Maine held that there was no authority under state law to award any benefits once the $6,000 ceiling on disability compensation had been reached. *Simpson's Case*, 144 Me. 162, 66 A.2d 417 (1949); Pet. App. 66a-71a.

On March 22, 1977, Simpson filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. (& Supp. IV) 901 *et seq.* He sought $1,500 (the difference between the $6,000 recovered under the Maine Act and the $7,500 maximum under the federal Act in 1941) plus reimbursement for his medical expenses (unlimited under the federal Act, but not under state law) (Pet. App. 2a). The administrative law judge (ALJ) denied Simpson's claim, relying solely on the Fifth Circuit's decision in *Shea* v. *Texas Employers' Insurance Association*, 383 F. 2d 16 (1967). Applying *Shea*, the ALJ concluded that Simpson was not covered under the LHWCA because he "had no right to benefits under the [federal] Act" (Pet. App. 24a) prior to this Court's decision in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962).

The *Calbeck* decision established that, irrespective of concurrent state coverage, federal coverage extended to all injuries on "navigable waters of the United States (including any * * * dry dock)" (33 U.S.C. 903(a); Pet. App. 64a-65a).[1] The ALJ reasoned that, prior to *Calbeck*, a claimant who received a state compensation judgment was excluded from federal coverage by virtue of Section 3(a) of the LHWCA. That section provided for benefits "only * * * if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." Former Section 3(a) (previously codified at 33 U.S.C. (1970 ed.) 903(a)).[2] Pet. App. 6a.

Simpson appealed to the Benefits Review Board, pursuant to Section 21(b)(3) of the LHWCA, 33 U.S.C. 921(b)(3). The Board affirmed the denial of benefits in a 2-1 decision (Pet. App. 21a), although employing a different rationale than the ALJ. The Board majority disagreed (*id.* at 26a-27a) with the ALJ's reliance on *Shea* v. *Texas Employers' Insurance Association, supra*, on the ground that that opinion was inconsistent with this Court's holding in *Calbeck* that the LHWCA, as originally written, applied to "all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." *Calbeck* v. *Travelers Insurance Co., supra*, 370 U.S. at 117 (footnote omitted). The Board nevertheless affirmed the ALJ's denial of benefits, reasoning that, under the analysis

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[1]Petitioners do not dispute that Simpson's injury occurred on a "dry dock" within the meaning of this provision. See *Avondale Marine Ways, Inc.* v. *Henderson*, 346 U.S. 366 (1953).

[2]Congress removed the proviso of Section 3(a) from the Act in 1972. See generally *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 720-721 (1980). It is undisputed that the 1972 amendments have no effect on Simpson's claim (Pet. App. 2a n.1).

in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), *Calbeck* should not be applied "retroactively" to claims arising from injuries incurred before the decision (Pet. App. 47a). Rather than applying *Calbeck*, the Board determined that it would "apply the law in effect during the time when claimant's state claim was pending" (*ibid.*). The Board therefore achieved the same result as the ALJ because of its view that Section 3(a) of the LHWCA at the time of Simpson's injury "allowed recovery only under state compensation law for employees engaged in new ship construction" (Pet. App. 47a).[3]

Simpson sought review of the Board's decision in the court of appeals, pursuant to Section 21(c) of the Act, 33 U.S.C. 921(c). The Director participated as respondent and filed a brief in support of Simpson's petition for review. The court granted the petition and held that Simpson was entitled to benefits under the Act. The court first noted that "[i]t is clear that Simpson's injury fell within the coverage of the Act's jurisdictional rule, 33 U.S.C. § 903(a) (Section 3(a) of the Act) as it was interpreted in *Calbeck, supra*" (Pet. App. 2a; footnote omitted). Moreover, the court emphasized, "the retroactive applicability of judicial decisions of federal courts is the rule, not the exception" (*id.* at 7a). Using the Court's three-factor test in *Chevron Oil Co.* v. *Huson, supra*, the court below concluded that the general rule of retroactivity should obtain here.[4] Specifically, the

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[3]Board Member Miller dissented, reasoning that "*Calbeck* was an interpretive decision" (Pet. App. 51a), which the Supreme Court majority itself characterized as being fully consistent with prior case law (*id.* at 54a).

[4]The court noted one "question on which the Supreme Court has not yet given explicit guidance: should the [*Chevron Oil*] factors * * * be analyzed in light of the particular litigants in a given case, or in light of general patterns throughout society?" (Pet. App. 9a). The court decided that retroactivity should be determined in light of general, not particularized, interests (*ibid.*).

court concluded that: (1) "*Calbeck* was not an overruling decision," but rather was a clarifying opinion reasonably foreshadowed by prior case law (Pet. App. 10a); (2) "retroactivity would be consistent with *Calbeck's* purpose, and nonretroactivity inconsistent" (*id.* at 15a); and (3) the equities weigh in favor of retroactive benefits for injured employees, rather than a coverage exemption for employers, who "would have had only slight justification" for relying on an interpretation contrary to the one ultimately reached in *Calbeck* and whose actual reliance on such an erroneous interpretation was not "particularly extensive" (*id.* at 16a, 18a). Finally, the court summarily dismissed petitioners' other arguments, including the theory adopted by the Fifth Circuit in *Shea*, because "*Shea* misapprehended the import of *Calbeck*," which held that, notwithstanding Section 3(a) of the LHWCA, Congress in 1927 had authorized federal compensation for all work-related injuries on navigable waters (Pet. App. 19a).[5]

ARGUMENT

The court of appeals correctly concluded that the jurisdictional holding of *Calbeck* v. *Travelers Insurance Co., supra*, should be applied to this case, which arose out of injuries antedating that decision. As petitioner acknowledges, this is the first case that has considered the retroactivity of *Calbeck*; because that decision was announced in 1962, this issue is now largely of historical interest. *Shea* v. *Texas Employers' Insurance Association, supra*, which denied federal benefits to a claimant who had accepted a state award prior to *Calbeck*, is plainly incorrect and, as the

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[5]The court also summarily held that the situs requirement of the Act was met and that the election of remedies doctrine is inapplicable under *Calbeck* v. *Travelers Insurance Co., supra*, 370 U.S. at 131-132, and *Sun Ship, Inc.* v. *Pennsylvania, supra*, 447 U.S. at 724 (Pet. App. 19a-20a).

Benefits Review Board noted (Pet. App. 27a), "has not been used as precedent for courts deciding similar cases." Further review by this Court is therefore unwarranted.

1. The court of appeals correctly applied this Court's guidelines, most clearly set forth in *Chevron Oil Co.* v. *Huson*, concerning the retroactivity of opinions construing legislative enactments. The general presumption, of course, is that court decisions are fully retroactive. See *Robinson* v. *Neil*, 409 U.S. 505, 507-508 (1973). Notwithstanding this general presumption of retroactivity, however, *Chevron Oil* enumerates three factors that may counsel in favor of appiying a particular judicial construction only prospectively.[6] The court below properly found that none of these factors indicates that this Court's interpretive decision in *Calbeck* v. *Travelers Insurance Co.*, *supra*, should be denied full, retroactive effect.

a. Under the first *Chevron Oil* factor, any "decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co.* v. *Huson*, *supra*, 404 U.S. at 106

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[6]The court of appeals addressed each of these three factors after making the threshold determination that retroactivity questions should be decided in light of general societal interests rather than in light of the specific facts in a given case (Pet. App. 9a-10a). Petitioners do not quarrel with this proposition as a general matter, but argue only that the court should have considered the retroactivity question by analyzing the state of the law "at the time the particular claim in this case arose" rather than at the time of the *Calbeck* decision (Pet. 14). This approach, however, would completely undermine the court's conclusion that a retroactivity decision "should not be controlled by specific, possibly aberrational facts" and that "the presumption of retroactivity (and the interest in uniformity) is outweighed [only] when there are sufficient indications of justifiable *societal* reliance on a different rule" (Pet. App. 10a; emphasis in original).

(citations omitted). The court below reviewed the precedent before *Calbeck* and correctly concluded that "the legal waters were so muddy before 1962 that it would have been quite imprudent" for employers to have relied on a construction that the LHWCA did not apply to *all* work-related injuries on the water (Pet. App. 12a).

The debate in the early cases was whether Section 3(a) of the 1927 Act, 33 U.S.C. (1928 ed.) 903(a), extended federal coverage only if the states could not constitutionally provide relief for an injury under the "maritime but local" doctrine, which distinguished cases within the reach of state jurisdiction from those for which federal jurisdiction was deemed exclusive. See generally *Calbeck* v. *Travelers Insurance Co., supra*, 370 U.S. at 115-120; *Davis* v. *Department of Labor*, 317 U.S. 249, 252-253 (1942). This Court definitively resolved the dispute in *Calbeck* when it construed the state-law proviso in Section 3(a) as follows (370 U.S. at 126-127; footnotes omitted):

> We conclude that Congress used the phrase "if recovery * * * may not validly be provided by State law" in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters. By that language Congress reiterated that the Act reached all those cases of injury to employees on navigable waters as to which [certain pre-1927 cases] had rendered questionable the availability of a state compensation remedy. Congress brought under the coverage of the Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law.

Petitioners argue that this Court's decision in *Calbeck* "was not foreshadowed by prior law" (Pet. 23) and that "[b]y virtue of the clear language of the statute" and existing

precedent,[7] Simpson was not entitled to benefits under the LHWCA at the time of his injury in November 1941 (Pet. 19). As the court of appeals noted (Pet. App. 12a-13a n.11), however, the *Calbeck* decision did not, as petitioners suggest, read the Section 3(a) proviso out of the Act. Rather, the Court in *Calbeck* merely adopted one supportable interpretation of Section 3(a) over another, in the course of construing ambiguous statutory language in light of its legislative history. Moreover, petitioners' charge that *Calbeck* was a clear break with past precedent is belied by the *Calbeck* majority opinion, which analyzed past precedent and explained that the Court's "previous decisions under the Act are entirely consistent" with the conclusion in *Calbeck*. 370 U.S. at 127. See, *e.g.*, *Avondale Marine Ways, Inc.* v. *Henderson*, 346 U.S. 366 (1953); *Davis* v. *Department of Labor, supra*; *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244 (1941) (discussed in *Calbeck* v. *Travelers Insurance Co., supra*, 370 U.S. at 127-129). See also *De Bardeleben Coal Corp.* v. *Henderson*, 142 F.2d 481, 483-

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[7]Petitioners overestimate (Pet. 17-19) the significance of the Court's holding in *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1922), that a state compensation remedy could constitutionally apply to an injured shipbuilder. That case, decided well before enactment of the Longshoremen's Act, obviously does not reflect the congressional intent embodied in the subsequent statute. Moreover, *Rohde* was not so broad and unequivocal a recognition of state authority as petitioners describe. *Rohde* held that federal maritime law *was* applicable to a shipbuilder's injury on navigable waters, but that federal law could be modified or supplemented by state compensation law in the discrete circumstances of that case, where the parties had contracted in contemplation that the state remedy would apply. 257 U.S. at 476-477. The Court's holding that the state remedy could validly apply to modify the general maritime law in that context, where Congress had not authorized a federal remedy, obviously does not establish whether state laws could validly apply to similar employment after Congress had enacted the Longshoremen's Act.

484 (5th Cir. 1944) (described by the court below as embodying "precisely the *Calbeck* analysis, eighteen years before *Calbeck*" (Pet. App. 15a)).

b. The second *Chevron Oil* factor is " 'whether retrospective operation [of the rule in question] will further or retard' " the purpose and effect of the rule. *Chevron Oil* v. *Huson, supra*, 404 U.S. at 107, quoting *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965). The court below properly reasoned that *Calbeck* "sought to implement Congress's desire that the Longshoremen's Act provide the federal scheme of compensation to a certain, clearly identified class of workers," namely, those injured on navigable waters in the course of their employment (Pet. App. 15a). Thus, retroactivity would be consistent with *Calbeck's* purpose because "[r]etroactive application would provide that certainty equally to all employees injured since the passage of the Act" while "[n]onretroactivity would leave workers injured before 1962 without the certain remedy that the 1927 Congress supposedly intended to provide" (*ibid.*). Petitioners' only challenge to this conclusion is to suggest that certainty would not be fostered by retroactive application of *Calbeck* because "a flood of litigation would probably result by workers and employers similarly situated to the claimant and the employer in this case" (Pet. 24). But, as the court below noted, this fear of a flood of litigation is "a bald assertion, unsupported by evidence or expert predictions," and moreover is illogical (Pet. App. 16a). "At the time *Calbeck* was decided, the theory of federal nonretroactivity was still inchoate. Any flood that the decision might have stimulated would certainly have come early in the 1960's, not in the 1980's" (*ibid.*).[8]

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[8]Thus, petitioners' claim (Pet. 11) that the decision below is important and far-reaching is not substantiated. It is more logical to conclude that this case is a novel one, unlikely to have a widespread effect.

c. The third *Chevron Oil* factor requires a court to weigh the equities, for " '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' " *Chevron Oil* v. *Huson, supra*, 404 U.S. at 107, quoting *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969). The lower court considered both the equities in favor of claimants like Simpson who "assert that they should receive the benefits that the 1927 Congress said they were entitled to" and those of employers like Bath Iron Works who relied on the unsettled state of case law and chose to "forgo insurance against liability under the federal act" (Pet. App. 16a). The court appropriately determined that the equities do not weigh in favor of the employers.

First of all, in view of the unsettled and conflicting case law in the early years of the Act's existence, "an employer would have had only slight justification" for relying on an interpretation that resulted in denial of federal benefits for *any* injury on the water (Pet. App. 16a). "Furthermore, the extent of that reliance—though not easily gauged—does not seem to have been substantial" (*ibid.*). Specifically, the court of appeals doubted that, "[g]iven the [$7,500] ceiling on federal compensation," the potential gross liability would be very large for employers who chose not to carry federal insurance before *Calbeck* (*id.* at 17a; footnote omitted). Similarly, on the assumption that the extent of an employer's reliance could be measured by its decision to forgo purchasing LHWCA insurance coverage, the court considered "the amount of money employers in [Bath Iron Works'] position would have saved by limiting their insurance coverage to state liability" (Pet. App. 17a). Available sources indicate that, for a small fee, the standard workers' compensation policy in effect at the time could have been extended to cover operations subject to the federal Act (*id.*

at 17a-18a). In sum, the court concluded, "[n]o matter how one approaches the measurement of employer reliance, we have no reason to think it was particularly extensive" (*id.* at 18a). Thus, the equities do not tip in favor of the employers over a claimant, like Simpson, for whom Congress intended to provide federal benefits.[9]

2. Petitioners' final argument (Pet. 27-30) is that this suit should be barred by virtue of the "election of remedies" doctrine. The court of appeals correctly rejected this argument (Pet. App. 20a), based on *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 724 (1980), and *Calbeck* v. *Travelers Insurance Co., supra*, 370 U.S. at 131-132.[10] In *Calbeck*,

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[9]This result is particularly appropriate in view of the fact that all the employer had to do to trigger the statute of limitations under the federal Act was to file a Section 30(a) report of injury. 33 U.S.C. 930(a). See Pet. App. 56a (Miller, J., dissenting).

[10]The cases on which petitioners rely (Pet. 27-29) do not support their position. In *Texas Employers Insurance Association* v. *Calbeck*, 249 F. Supp. 217 (E.D. Tex. 1966), aff'd on different grounds *sub nom. Shea* v. *Texas Employers' Insurance Association, supra*, and *Windrem* v. *Bethlehem Steel Corp.*, 293 F. Supp. 1 (D.N.J. 1968), the claimant had successfully asserted the proposition, in proceedings on a state claim, that state law *and not the Longshoremen's Act* applied to his injury. Thus, each case was governed by collateral estoppel principles, and their "election of remedies" statements were, at best, dicta. Furthermore, the issue framed in the state litigation in each of those cases supported the factual proposition that the claimant had made an intentional choice to forgo a known available remedy under the Longshoremen's Act in favor of a state remedy regarded as inconsistent with it. In this case, on the contrary, no issue of LHWCA coverage was actually litigated or decided in the Maine proceedings, and Simpson did not know of the availability of a Longshoremen's Act remedy. *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, 583 F. 2d 1273 (4th Cir. 1978), does not support the proposition, ascribed to it by petitioners, that the election doctrine provided a legitimate defense under the pre-1972 Longshoremen's Act; rather, while acknowledging that a number of earlier cases had referred to the doctrine, *Newport News* questioned their correctness and found the doctrine to be both disfavored and, in any event, inapplicable where the two remedies in question are not mutually exclusive and do not require the party seeking

one of the employees had previously received state benefits, but that circumstance was held not to bar a supplemental award under the federal Act. *Id.* at 131. To be sure, the *Calbeck* Court referred to the particular circumstances of that case in rejecting the election argument, but any contention that *Calbeck's* ruling on this point can be limited to its facts is foreclosed by the Court's recent decision in *Sun Ship, Inc.* v. *Pennsylvania, supra.* There the Court expressly recognized the general rule that supplemental relief is available under the LHWCA after a smaller award under state law. 447 U.S. at 724.[11]

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them to assume inconsistent positions. *Id.* at 1276-1278. As this Court recently noted, rather than being inconsistent and mutually exclusive so as to warrant application of the election doctrine, "the pre-1972 Longshoremen's Act ran concurrently with state remedies in the 'maritime but local' zone." *Sun Ship, Inc.* v. *Pennsylvania, supra*, 447 U.S. at 720; see also *id.* at 724 n.6.

[11]The Court in *Sun Ship* also noted the "remote contingency" that "if a particular state compensation law provision does indisputedly declare its awards final, a conflict with the LHWCA may possibly arise where a claimant seeks inferior state benefits in the first instance." 447 U.S. at 724 n.6. But there is no contention that the Maine law contains such a provision. (As noted in another case decided the same Term as *Sun Ship*, it appears that only the Nevada compensation statute contains a provision with the requisite language making awards indisputably exclusive of other compensation remedies. *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 275 n.21 (1980) (plurality opinion)). Moreover, the Court suggested in *Sun Ship* that the federal Act would preempt such a state provision, if the provision's application even threatened to deny a supplemental award under the federal Act. 447 U.S. at 724 n.6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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